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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. [redacted] Miscellaneous

755

HAROLD D. ROGERS
Petitioner

vs.

MARK S. RICHMOND, WARDEN
Respondent

On Petition For a Writ of Certiorari To the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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Dated June 3, 1958

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No. 775 Miscellaneous

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vs.

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Respondent

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The citations of the opinions of the lower courts are adequately set forth in the Petition and Appendix thereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Should the Court entertain a petition to grant certiorari in this case wherein the Circuit Court did not rule on the merits but remanded it back to the District Court for "further proceedings?"

2. Did the Circuit Court err in holding that because of the nature of the issues and a proper regard for the delicate balance of federal-state relationships, the District Court should not have overturned the State's adjudication without an examination of the complete state proceedings?

3. Did the District Court abuse its discretion in reversing the State's adjudication in the absence of "special circumstances" or a "vital flaw" in the state process?

STATEMENT OF THE CASE

On the evening of November 21, 1953, Dorothy Kennedy was shot and killed by the appellee in her husband's liquor store in West Haven. Earlier that day the appellee, having decided to procure money by means of robbery, stole a revolver and eight cartridges from the home of his nephew. Directly after leaving his nephew's home he loaded six cartridges into the gun and purchased a half-pint of whiskey at a store in New Haven.

After consuming a portion of the liquor, Rogers drove to West Haven and parked his car opposite the store of decedent. Entering the store, he asked decedent for a half-pint of liquor and thereupon produced his gun and announced his purpose to commit robbery. As decedent ran to the telephone, appellee followed her behind the counter and struck her on the head with the butt end of the gun. He then fired five shots at deceased, two of which struck her and resulted in almost immediate death. Appellee then removed the cash amounting to Sixty Dollars from the cash register and drove off.

In the meantime Rogers' nephew, having discovered the loss of his gun, sought out appellee and charged him with taking the gun. Appellee, however, steadfastly denied stealing it whereupon both men went to Police Headquarters and reported that the gun had been stolen by persons unknown. Thereafter appellee

kept the gun in his possession but endeavored to conceal its identity by filing off the serial numbers.

On January 9, 1954, appellee was arrested by the New Haven Police on charges of Attempted Robbery, Breaking and Entering and Theft, committed that day at the Travelers Hotel. As the officers made the arrest, they observed Rogers hide a gun under the seat of his automobile. On being questioned he gave a signed statement to the police claiming that he had just won the gun in a "crap game" that afternoon, but in a statement the following day he admitted stealing it from his nephew's home (R. 286).

On January 13, 1954, appellee was presented in the City Court of New Haven on the Travelers Hotel charges and was bound over to the April Session of the Superior Court and in default of bail was lodged in the County Jail.

On the morning of January 30, 1954, ballistics tests conducted by the State Police established that the bullets recovered from the Kennedy murder scene were fired by the gun found in appellee's possession. Thereupon, at about 1 P. M. on the same day, appellee was brought to the office of the State's Attorney for questioning. Detectives started to question him at about 2 P. M. (R. 195). At all times during the questioning Rogers was seated in a comfortable armchair (R. 42). During the afternoon he was invited to eat and did eat and have coffee with the detectives, and later in the evening he was asked again if he wanted to eat but chose merely to take coffee (R. 34). He smoked his own cigarettes and those of the officers, and he was taken to the men's room on request. When he first expressed a desire to smoke, one handcuff was released and thereafter one hand remained free during th remainder of the questioning (R. 42).

Appellee makes no claim that physical violence or threats of physical violence were used against him at any time and he acknowledges that at no time did the questioning by the police confuse him (R. 33).

At 8 P. M. Captain Eagan of the New Haven Police Department, came in to question Rogers. Eagan, who was acquainted with Rogers from a prior arrest, told Rogers that he did not have to say anything (R. 28). During the course of the interrogation, Eagan informed Rogers that Mrs. Rogers would have to be questioned in order to ascertain whether he had said anything to her about the murder and that during her questioning the two state wards who were then living with them would be taken care of at the Children's Center (R. 199, 316). At about 9 P. M. Eagan made a pretended call on a dead wire to hold a car and officer in readiness to bring Mrs. Rogers down for questioning. During the next hour Rogers was not questioned at all (R. 243). At about 10:30 P. M. Rogers said he had been drinking that night (R. 200) and then proceeded to confess orally that he had shot and killed Mrs. Kennedy. Thereupon a Court Reporter was called and arrived at about 11 P. M. Rogers repeated his confession while the Reporter recorded it stenographically (R. 325). The confession consisted of thirty typewritten pages. At the outset he related, largely in narrative form (R. 325-326), an elaborately fabricated and detailed story of 1) a six month adulterous relationship between the decedent and himself; and 2) a claim of provocation for the murder based upon profane and abusive remarks by the decedent to him just before the shooting. Throughout his confession Rogers answered questions freely and without hesitancy. On its completion shortly after 12 P. M. Rogers made oath to its truth. The next day some seventeen hours later, Rogers gave a second confession to the Coroner at his official inquest (R. 347-369). At the commencement of this second confession, the Coroner fully informed Rogers of his legal rights including his right to counsel and his right to remain silent (R. 347-348). Rogers thereupon acknowledged his awareness of his rights and expressly declined the services of counsel.

Rogers was forty-eight years old, highly intelligent (R. 319), and the brother of a New Haven police officer. He had been

arrested and interrogated by police on at least four occasions prior to the questioning on January 30th, the first time being in connection with a New York offense, the second after an arrest for violation of parole, the third for a liquor offense in 1949 in New Haven, the fourth, the arrest on January 9th for the Travelers Hotel robbery (R. 195-196).

On March 2, 1954, the Grand Jury for the County of New Haven returned an indictment charging Rogers with first degree murder. Rogers was represented by counsel on the day of the Grand Jury indictment and at all stages of the proceedings since. Appellee entered a plea of not guilty and went to trial on a charge of murder in the first degree in the perpetration of a robbery—a capital offense.

During the course of the state trial, on motion of appellee, the Trial Court excused the jury and heard evidence at great length as to the circumstances surrounding his confession to the police. At this preliminary hearing, Rogers testified and called witnesses in his own behalf, and the Court excluded questions concerning the truth or falsity of the confession. The Trial Judge made thirty-seven express findings of fact (R. 314-317) and ruled that the confession was freely and voluntarily made. After this finding of voluntariness by the Court, the jury in the course of the trial considered the same facts, claims and circumstances surrounding the making of the confession in determining its weight and credibility. The truth of Rogers' confession of this murder was not disputed by any witness at the trial (R. 317). There was substantial evidence other than the confession connecting Rogers with the murder, notably the ballistics evidence, possession of the murder weapon on the night of the murder (R. 56), and the possession of the murder gun at the time of his arrest (R. 196). The jury returned a verdict of guilty of murder in the first degree.

On appeal, the Supreme Court of Errors considered the circumstances surrounding the confession and held that the confes-

sion was freely and voluntarily given and affirmed the conviction (R. 219) (O'SULLIVAN, J., dissenting).

The Supreme Court of the United States denied certiorari.

The appellee thereupon instituted this habeas corpus proceeding in the Federal Court below. At the hearing on the application, Rogers, the High Sheriff for New Haven County, the Deputy Jailer, and four detectives testified but the Court did not examine the state record (R. 388).

The Court below set aside Rogers' conviction on the ground that his confession to the police on January 30th was involuntarily given and that its use at the trial constituted a denial of due process (R. 176-180).

The appellant then filed motions to amend the findings and for a rehearing (R. 182-194). The Court amended and supplemented several findings but denied the motion for rehearing (R. 194-196).

A Certificate of Probate Cause for Appeal was allowed by the District Court, (SMITH, J.) (R. 196).

On appeal the Court of Appeals for the Second Circuit vacated the judgment of the District Court and remanded it for further proceedings, 252 F 2d 807. The Court of Appeals concluded that the District Court erred in failing "to call for and consider the trial record or so much thereof as related to the admissibility of the confessions . . ." 252 F 2d at 810-11. The Court of Appeals further instructed the District Court that on remand it should, unless a "vital flaw" or "unusual circumstances be present, confine itself exclusively to the state trial record in ascertaining the basic or underlying facts," 252 F 2d at 811.

ARGUMENT

The Petition presents a narrow issue. The ruling of the Court of Appeals did not pass upon the merits of the case but merely remanded it to the District Court "for further proceedings." Although we concede that this Court may grant certiorari where no final judgment has been entered by the lower court, *Land* vs. *Dollar*, 330 U. S. 731, 734, we respectfully submit that the present case is not appropriate for review at this time, because there is no jurisdictional issue fundamental to the conduct of the case involved, *Larson* vs. *Domestic & Foreign Corp.*, 337 U. S. 682, 685 and because the Court of Appeals remanded the case with instructions to the District Court to conform to the express provisions of *Brown* vs. *Allen*, 344 U. S. 443 (1953).

I

THE DECISION BELOW IS CLEARLY CORRECT

(a) The District Court should have considered the State Record.

The Court of Appeals concluded the District Court's failure to examine the state trial record "or so much thereof as related to the admissibility of the confessions" was error and remanded the case to the District Court "for further proceedings." The Court of Appeals did not review the merits.

This ruling was clearly correct and in line with this Court's prior pronouncements. Both Justice Reed's opinion and Justice Frankfurter's concurring opinion speak for a majority in *Brown* vs. *Allen*, *supra*, and in discussing the proper procedure to be followed in the District Court in a habeas corpus proceeding, both opinions stress the importance of considering the state record, if available. Justice Reed indicates that where the record of the state trial affords "an adequate opportunity to weigh the sufficiency

of the allegations and the evidence and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required." 344 U. S. 463. Justice Frankfurter states that the District Court "must take due account of the proceedings that are challenged by the application for a writ. All that has gone before is not to be ignored as irrelevant." 344 U. S. 500. And, at page 501, he states that in habeas corpus proceedings, federal judges should "probe the federal question while drawing on available records of prior proceedings to guide them in doing so." And again, at page 504, he states:

> "In some cases the state court has held a hearing and rendered a decision based on specific findings of fact; there may have been review by a higher state court which had before it the pleadings, the testimony, opinions and briefs on appeal. *It certainly would make only for burdensome and useless repetition of effort if the federal courts were to rehear the facts in such cases.*" (emphasis added)

In failing to consult the record of the state proceedings, the District Court misconceived its role when called upon to review a criminal conviction wherein the basic facts of voluntariness are specifically set forth in a clearly adequate record.

> "Applications to district courts on grounds determined adversely to the applicant by state court should (result in) . . . refusal of the writ without more, if the court is satisfied, *by the record*, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion." (emphasis added)
>
> *Brown* vs. *Allen, supra*, 463.
>
> See, also *U. S. ex rel. Smith* vs. *Baldi*, 344 U. S. 561, 569-70.

"It is up to the District Judge to examine this record carefully to determine whether it is adequate to show that the state courts 'have considered and adjudicated the merits'

and to show the methods by which the state court determined the facts."

Beverly, *Federal-State Conflicts in The Field of Habeas Corpus*, 41 Calif. L. Rev. 483, 492-93.

See, also *Dorsey* vs. *Gill*, 148 F 2d 857, 81 cert. denied, 325 U. S. 890.

When a state prisoner requests a writ from the federal court, the District Judge should examine the state record in order to ascertain what issues and claims had been presented to the state court; whether there had been a specific adjudication of the basic facts; whether the orthodox rule or the New York rule had been applied on the voluntariness of the confession; whether there was a "vital flaw" in the state process; and whether the state trial judge's determinations were so clearly erroneous as to warrant holding a plenary hearing and a retrial of the exact factual issues previously adjudicated in the state courts.

"The proper standard for the federal district court to apply, then, is the standard normally applied on review to factual findings by a trial judge. If it does not appear from the record that the state trial judge's determination was clearly erroneous, no retrial on the coercion issue should be granted."

Confessions, *Habeas Corpus and The Stein Case*, 8 Stanford L. Rev. 451, 462.

In the instant case, the District Court did not consider the contents of the state record. This became apparent to the respondent only after the Court filed its Memorandum of Decision. Thereupon respondent produced the state record on his Motion For Correction of Finding and For Rehearing, but the court refused to examine or consider its contents (R. 338). We respectfully submit that the Court of Appeals properly held that "the nature of the issues presented and proper regard for the delicate balance of federal-state relationships required the District Court Judge to obtain and examine the state proceedings at the outset of these proceedings." 252 Fed. 807, 810.

(b) The Court of Appeals did not err in holding that on remand the District Court should "make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the state trial court," absent a "vital flaw" or "unusual circumstances" within the meaning of *Brown* vs. *Allen*.

The Connecticut state trier in preliminary hearings considered the admissibility of each of Rogers' confessions. At these preliminary hearings the jury was excused, Rogers testified in his own behalf and called witnesses, and the Court excluded questions concerning the truth or falsity of the confessions (R. 245-246). At the conclusion of the hearing on the confession to the police, the Trial Judge made thirty-seven findings of fact from the evidence and ruled that the confession was freely and voluntarily made (R. 317), and as to the confession to the Coroner, the Court made twenty-four findings of fact and made a similar ruling as to the voluntariness (R. 320). The District Court overruled the following basic or underlying facts found by the state trier:

1. "At no time was the accused subjected to continuous or extended questioning." (R. 316)

2. "The treatment of the accused by the investigators was at all times considerate." (R. 317).

3. "No force, threats or inducements were made or offered the accused at any time." (R. 316)

4. "The accused had experienced previous arrests and interrogations and the treatment accorded to him on this occasion did not adversely affect him." (R. 317)

5. "The accused did not at any time on the day in question request the presence or assistance of an attorney." (R. 317)

6. "If there was any element of irregularity or illegality in his presence at the State's Attorney's office on that date, the accused was not aware of it and it had no effect upon him and

there was no causal connection between it and the confession." (R. 317)

The respondent conceded that the District Court had the power to review and overrule the *ultimate conclusions of fact or of law* determined by the state trier but claimed that the District Court lacked the power to conduct or, at least, abused its discretion in conducting an independent *de novo review* of the historical or subordinate facts upon which the ultimate constitutional question rested in the absence of a "vital flaw" or "unusual circumstances" within the meaning of *Brown* vs. *Allen*. The respondent's position on this point was sustained by the Court of Appeals.

In *Brown* vs. *Allen*, at page 506, Mr. Justice Frankfurter stated that, "Unless a vital flaw be found in the process of ascertaining such facts in the state court, the District Court may accept their determination in the State proceeding and deny the application." This important principle was reaffirmed in *United States ex rel. Smith* vs. *Baldi*, 344 U. S. 561, 569:

> "Not unless special circumstances prevail, should the lowest federal court reverse the highest state court in cases where the constitutional issues have been disposed of on the merits by the highest state court in an opinion specifically setting forth its reasons that there has been no denial of due process of law, and where the record before the state court and the allegations in the petition for the writ before the federal court fail to disclose that the state in its prosecution departed from the constitutional requirements . . .
>
> "This review of the proceedings accords without holding in the *Brown* case."

In *Daniels* vs. *Allen*, 192 F. 2d 763, 768; aff. sub. nom *Brown* vs. *Allen*, 344 U. S. 443, this Court defined "special circumstances" as that which

> ". . . renders it impossible or unlikely for him to obtain adequate protection of his rights in the courts of the

state; i. e. he is entitled to the writ in the federal courts 'only when the state courts will not, or cannot do justice.'"

As was stated by Mr. Justice Reed, "Where the record . . . affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required."

Brown vs. *Allen, supra*, at page 463.

II

THERE IS NO CONFLICT

The District Court and the relator place great reliance on *Cranor* vs. *Gonzales*, 9 Cir., 226 F 2d 83 (1955). The Court of Appeals, in its opinion, holds that this reliance "is misplaced," 252 F 2d at 810, and clearly and fully points out the "obvious" distinction between the *Cranor* and the instant case, 252 F 2d at 810.

Furthermore, in the *Cranor* case, in addition to the considerable circumstance that the state proceedings were inherently defective, there was evidence that the prisoner had been beaten by police. There had been no preliminary hearing and no special findings of fact on the issue of coercion, 226 F 2d, at page 90. Thus, utterly lacking a record which it might consult, the Court actually had no alternative but to exercise its discretion to ascertain the facts for itself. The *Cranor* case expressly recognizes the marked disadvantage which an accused suffers under the "New York" procedure. The Court found that the "New York" method of handling confessions gave rise to "special circumstances" justifying federal court intervention, since "it would have been impossible for the defendant to establish that the jury found the confession involuntary and then improperly considered it in reaching a general verdict of guilty," 226 F 2d at page 89, and that the

ambiguity inherent in the "jury method" of determining coercion constituted a "special circumstance" or "vital flaw." 226 F 2d at page 88. This same difficulty was recognized in the *Stein* case, *supra*, because the "New York" method is "not informative as to its disposition," since, "we cannot learn whether the final result was to receive or reject the confessions as evidence of guilt." 346 U. S. at pages 177-178.

However, under the "orthodox" method as painstakingly employed in the trial of Rogers, there was no such "vital flaw" or "special circumstances" as existed in *Cranor* because there was a clearcut adjudication at the trial stage by the trial judge (R. 314-317), and Rogers was accorded a full and fair trial completely in accord with due process of law. He was represented throughout by competent experienced counsel. The Trial Court in the absence of the jury heard evidence at great length as to the circumstances surrounding these confessions (R. 231-240, R. 264-266). At this preliminary hearing Rogers testified with respect to the voluntariness of his confession. He did not so much as imply that the action before or during the making of the confessions was accompanied by force or by the threat of force. The Trial Court found that the questioning was never continuous or extended (R. 316); there were delays, recesses and interruptions; the treatment accorded petitioner was considerate (R. 317); he was at all times seated in a comfortable armchair (R. 315) and was not denied relief, food, coffee or cigarettes (R. 315-316); he is intelligent (R. 319); he had experienced previous arrests and interrogations (R. 317); his confession was not pro forma but consisted of thirty typewritten pages (R. 325-345); and that his confession was given freely and voluntarily (R. 317).

In strict compliance with the orthodox method, the Court carefully charged the jury with respect to the confession stating among other things:

> "You will give these statements or confessions that you have before you whatever weight you consider the[y]

entitled to, and in determining what weight you consider they are entitled to you consider all of the circumstances under which they were procured so far as these circumstances have been made known to you by the evidence. They include, among other things the fact that the accused was in custody and under the control of the officers at the time; that he was kept in this status that has been described as incommunicado, and the other elements in the evidence before you; the manner in which he was taken from the jail to the State's Attorney's office and to the Coroner's office, and what transpired on each of those occasions; the facts relating to what was said to him about his desire for counsel and everything else that you recall as being disclosed to you by the evidence, as to the circumstances under which the confessions and statements were made. All of the circumstances leading up to the making of these confessions, I say to you, are proper for you to consider in determining the weight that you are to give them . . . It is for you to determine what weight you are to give to them, and in that connection, as I have said, you should consider the circumstances under which they were made . . ."

This entire procedure was in full accord with the approved practice of handling confessions under the orthodox system and afforded Rogers all the advantage and protection inherent in that system.

The Supreme Court of Errors considered the same issues, and there for the third time Rogers' contentions were held to be without merit. Thereafter, the Supreme Court denied certiorari. It would appear that the present case, unlike *Cranor*, fits exactly within that class of case described by the Supreme Court in *Brown* vs. *Allen*, as follows:

> "In some cases the state court held a hearing and rendered a decision based on specific finding of fact, there may have been review by a higher state court which had before it the pleadings, the testimony, opinions and briefs on appeal."

It is crucial that in the present case the District Court swept aside the state's adjudications not only on the ultimate question of fact and conclusions of law but also on several "basic" or underlying facts although these exact questions and issues were raised and decided at three separate stages of the State proceedings and presented to the Supreme Court on certiorari. The facts relied on by Rogers are not dehors the trial record nor the trial court's finding, and their effect on the rulings of admissibility were open to consideration and review on appeal.

> "Nor has any territorial, state or federal court permitted habeas corpus to relitigate and redetermine issues already litigated to final appellate determination. To do so would cause litigation in criminal cases to be interminable and bring confusion into the administration of justice. A defendant may not litigate issues at trial and on direct attack exhaust his appellate remedies . . . and then supersede those remedies on collateral attack by habeas corpus, concerning the same issues which are admissive of the jurisdiction of the trial court to determine them."
>
> *Palakiko* vs. *Harper*, 209 F 2d 75, 80, cert. denied 347 U. S. 956.

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament. We are to keep the balance true."
>
> *Snyder* vs. *Mass.*, 291 U. S. 97, 122.

CONCLUSION

The respondent respectfully prays that this Court deny certiorari and allow the case to be returned to the District Court for further proceedings in accordance with the Court of Appeals' opinion.

Respectfully submitted,

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